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Criminal Law

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This language, of course, was used to determine the meaning of words within a contract already formed. The reasoning is sound, however, and so this language has now been applied by the court to situations where a question of ambiguity arises regarding the meaning given words upon the formation of a possible contract.

C. JUDLEY WYANT

CRIMINAL LAW

I. EFFECTIVE COUNSEL

The Wisconsin Supreme Court, in the term just completed, dealt with a number of aspects concerning "effective counsel" in criminal matters. The Court prescribed the length of time a defense counsel's responsibility extends to his client;[1] ruled on the number of defendants one lawyer may represent in one case;[2] and, in one of the more important decisions of the term, changed the standards by which "effective counsel" is determined.[3]

The question of what is effective counsel has become increasingly prevalent. This area is a most difficult one because such a question can only be answered on a case by case basis: by encompassing the rights of the defendant, the facts of the case and the professional judgment and strategy of the defense counsel. The rights of the defendant are defined by both the Federal and State Constitutions, and by extensive case law. The facts of the case are presented in the trial court's record and in effect form the basis of review for the supreme court. It is the last two factors, professional judgment and strategy of the defense counsel, that present the most problems. These factors are nebulous at best and any attempt to mold them into a set formula is an extremely difficult task.

In an attempt to deal with factors of professional judgment and strategy the court held in *State v. Simmons*[4] that an evidentiary hearing must be held whenever the competency of counsel is attacked. In the *Simmons* case the defendant was charged and found guilty of having sexual intercourse with a child. The defendant was represented by a court-appointed counsel until after conviction at

1. Whitmore v. State, 56 Wis. 2d 706, 203 N.W.2d 56 (1973).
2. State ex rel White v. Gray, 57 Wis. 2d 17, 203 N.W.2d 638 (1972).
3. State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973).
4. 57 Wis. 2d 285, 203 N.W.2d 887 (1973).

which time there was a substitution of counsel. On appeal from the conviction, sentence, and order denying a new trial, the defendant claimed that he was denied effective counsel at trial. The main basis for alleging ineffective counsel concerned the admission of certain evidence. It seems that the complete chain of escort was not presented when the evidence was admitted and the defense counsel did not object. The court stated,

> We cannot assume that trial counsel's failure to object to this evidence was the result of incompetence or is evidence of ineffective counsel. It well might have been a strategic waiver under the circumstances of the order of proof.[5]

The court then applied a test used in prior cases[6] stating that:

> . . . trial counsel is ineffective only when it is shown that the representation was so inadequate and of such low competence that it amounted to no representation at all and reduced the trial to a show and mockery of justice.[7]

The court further stated that when a trial counsel's competency is being challenged he should be given notice of the challenge.[8] In order to clarify its position that effectiveness of counsel can properly be challenged the court adopted Standard 8.6 of the ABA Project of Standards for Criminal Justice, *Standards Relating to the Defense Function*. It provides:

> (a) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, he should not hesitate to seek relief for the defendant on that ground.
>
> (b) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case provided effective assistance, he should so advise his client and he may decline to proceed further.
>
> (c) A lawyer whose conduct of a criminal case is drawn into question is entitled to testify concerning the accusations, even though this involves revealing matters which were given in confidence.

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5. 57 Wis. 2d at 297.

6. *See also* Swonger v. State, 54 Wis. 2d 468, 474, 195 N.W.2d 598 (1972); Quinn v. State, 53 Wis. 2d 821, 825, 193 N.W.2d 665 (1972); Milburn v. State, 50 Wis. 2d 53, 65, 183 N.W.2d 70 (1971).

7. 57 Wis. 2d at 294.

8. *Id.* at 297. "When the competency of trial counsel is questioned, it is incumbent upon one who seeks to show that incompetency to give notice to trial counsel that his handling of a criminal matter is being questioned on post-trial or post-conviction proceedings."

These standards assist procedurally when questioning the effectiveness of counsel but do little in answering the question of what is, in fact, effective counsel. As an answer to this question, the court in *Simmons*, as in prior cases, used the test of whether the trial was a mockery of justice as a result of the counsel's representation.

A few months after the *Simmons* case, the Wisconsin Supreme Court changed its test for effective counsel as noted in *State v. Harper*.[9] In making this change, the court discontinued a test that has been used since 1964[10] in favor of a test that, in the opinion of the court, was a higher test for competency. It is submitted that this change in Wisconsin law is probably the most significant change in the criminal law during the Court term under consideration.

Harper was charged with and found guilty of armed robbery. He was represented by a court-appointed lawyer through the trial and sentencing. In appealing the conviction, the defendant alleged ineffective trial counsel as one of the grounds for overturning the conviction. In accordance with the holding in *Simmons*, the trial lawyer was given notice of the challenge to his competency and was given an opportunity to testify as to the reason for his conduct of the trial. At the end of this hearing, the court found that the representation has been competent and that counsel was effective.

The court stated that under the old "mockery of justice" test, Harper had been afforded effective counsel. This time, however, the court changed the test for competent counsel to "the representation must be equal to that which the ordinary prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services."[11] The court used this test in light of the ABA *Standards Relating to the Prosecution and The Defense Function* (Approved Draft 1971) sections 3.2, 3.6, 3.9, 4.1 and 5.2.[12] The ruling that Harper had been afforded effective coun-

9. 57 Wis. 2d 543, 205 N.W.2d 1 (1973).

10. *See* Pulaski v. State, 23 Wis. 2d 138, 148, 126 N.W.2d 625 (1964).

11. 57 Wis. 2d at 557.

12. "3.2 Interviewing the client.

"(a) As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses."

"3.6 Prompt action to protect the accused.

"(a) Many important rights of the accused can be protected and preserved only by prompt legal action. The lawyer should inform the accused of his rights forthwith and take all necessary action to vindicate such rights. He should consider all proce-

sel under the old standard indicates that the court was applying the new standard prospectively only.

It is submitted that the "standard" the court adopted is not really a standard at all but is a restatement of a defense attorney's duty to his client. It is the duty that should be fulfilled regardless of whether the lawyer is privately retained or appointed by the court. The adoption of this standard does not make the issue of effective counsel any clearer than before. In fact, it is possible that the answer to whether a defendant was represented by effective counsel is now even more difficult to ascertain. The court shifted from an objective to a subjective test. The old standard permitted the court to look at the results of the representation in regard to the defendant's rights and conclude within the facts whether there was a "mockery of justice" or an effective defense. The new standard introduces extraneous factors into the determination by comparing the judgment of the trial counsel with that of another un-

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dural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for a change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, or seeking dismissal of the charges.

"(b) A lawyer should not act as surety on a bail bond either for the accused or others."

"4.1 Duty to investigate.

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession or the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty."

"5.2 Control and direction of the case.

"(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

"(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

"(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and his client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation."

"8.6 Challenges to the effectivness of counsel. . .

"(c) A lawyer whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation, even though this involves revealing matters which were given in confidence."

known, privately retained counsel who had nothing to do with the case.

When looking at the effectiveness of counsel, the focus of inquiry should be on whether the rights of the defendant were protected. The ABA recognized this when it promulgated the above mentioned sections that the Wisconsin court approved. It is doubtful that the court meant anything other than what the ABA standards suggest when it used the language in setting out the new test. But the language unfortunately raises questions that should not have to be considered when considering the rights of the defendant. For instance, does the fact that an attorney is handling his first criminal defense automatically subject him to an ineffectual counsel charge because he is without experience in this area? Does an attorney who usually is privately retained becomes less skilled or effective because he is appointed to defend an indigent? Which lawyer or lawyers will be used as a control to measure the alleged ineffective lawyer? Will such attorneys be selected from the county, state, or nation? Will attorneys be subpoenaed to appear at a hearing to answer a hypothetical question and render an opinion of how they would have conducted the trial, much like a doctor in a medical malpractice case? It is submitted that such questions will not have to be answered if the particular attorney's conduct and judgment during a criminal defense are weighed against the constitutional standards of adequate protection of a defendant's rights when effectiveness of counsel is in issue.

II. SEARCH AND SEIZURE

The 1972 term also produced a number of cases dealing with search by police officers without warrant.

The court reviewed two exceptions to the Fourth Amendment requirement of a search warrant in the case *State v. Pires*. In that case the police were dispatched to the defendant's residence to investigate the reported death of a child. Prior to the arrival of detectives a police ambulance conveyed the child, defendant-mother, and the father to the hospital. When detectives arrived they entered the house to look for the victims, unaware that the the victim had already been removed from the premises. Several minutes later more police arrived and informed the detectives on the scene of the prior conveyance of the victim to the hospital and that the mishap apparently was the result of a drug overdose. The

13. 55 Wis. 2d 587, 201 N.W.2d 153 (1973).

police then made a second search of the house and recovered inculpatory evidence which was found on a nightstand in a room other than the room where the police originally were positioned. The defendant moved to suppress this evidence and the motion was sustained by the trial court. The State appealed and the supreme court affirmed the trial court.

In finding the search and seizure of the inculpatory evidence unconstitutional, the court continued the trend to hold warrantless searches illegal. The search in *Pires* was thought to be justified by the "emergency" or "exigent circumstances" exception. This exception is based on the reasonableness of police conduct in assisting the victim or apprehending those responsible for a crime.[14] The court found that the first entry into the house for the purpose of searching for victims was reasonable, but the second search, in which the inculpatory evidence was seized, was illegal because at that time the police had knowledge of the victim's whereabouts and that the house was vacant of any possible suspects. By voiding the legality of the search as it did, the court was affirming the holdings of federal courts and its own decision of protecting the public by requiring a warrant to search.[15]

The other non-statutory exception to the requirement of a search warrant that the court dealt with in *Pires* was the "plain view" doctrine. That doctrine allows authorities to seize evidence without a search warrant when such evidence is in plain view.[16] The crux of the exception is that the police must be in a position lawfully to view the evidence. In *Pires* the police did not see the evidence during the first lawful search, it was not until during the second search that the evidence was seized. However, as discussed above, the police were not justified in making the second search, and hence were not in a position to lawfully observe the evidence. Therefore, the "plain view" exception did not apply. Here again the court was following a well established line of cases prohibiting warrantless searches.[17]

This past term also produced a number of cases concerning a statutory[18] exception to the need for a search warrant. This excep-

14. *See* United States v. Jeffers, 342 U.S. 48 (1951); Root v. Gauper, 438 F.2d 361 (8th Cir. 1973).

15. *Eg.* Collidge v. New Hampshire, 403 U.S. 443 (1971); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969); State v. Hoyt, 21 Wis. 2d 284, 128 N.W.2d 645 (1964).

16. *Id.*

17. *See also*, Ball v. State, 57 Wis. 2d 653, 205 N.W.2d 353 (1973).

18. WIS. STAT. §§968.24 and 968.25 (1971).

tion for a search during temporary questioning is the codification of the *Terry v. Ohio* rule,[19] the "stop and frisk" rule. The three cases considered were, *Waite v. State*,[20] *State v. Beaty*,[21] and *State v. Williamson*.[22]

In *Waite*, the defendant was stopped by police for questioning. One of the officers testified that he observed a "bulge" in the outer coat pocket of the defendant and for his own protection reached into the pocket with his hand. The officer removed a plastic bag containing pills that were subsequently introduced as evidence at trial. The supreme court held that this action of the officer was reasonable and therefore the search was not illegal.[23] It is submitted, however, that such conduct was not reasonable because there was no pat down to determine if in fact there was an instrument that could have harmed the officers. The cases cited by the court[24] to substantiate its holding of reasonableness of the search involved situations where in fact there was a pat down prior to the intrusion of the person's right to privacy. *Adams v. Williams*[25] is a case similar to *Waite* in that there was no pat down prior to intrusion. *Adams*, though, can be distinguished on the facts. In *Adams* the police officer had information from a reliable informer that the defendant was armed and he was told the exact location of the gun on the defendant's person. There was no such prior knowledge by the officer in *Waite*. At that point in time there was no probable cause to arrest the defendant nor reasonable grounds to search him in the manner used. Therefore the evidence obtained should not have been admitted.

The *Beaty* case involved the stopping of the defendant after his suspicious conduct was observed by the police. The police patted down the defendant and produced evidence that was subsequently used at trial. The court again used the cases cited in the *Waite* case to uphold the search.[26] In this case the court, placing its emphasis on the fact of the unexplained bulky objects in the coat pockets and a subsequent pat down, held the officers were entitled to reach into

19. 392 U.S. 1 (1968).
20. 57 Wis. 2d 218, 203 N.W.2d 719 (1973).
21. 57 Wis. 2d 531, 205 N.W.2d 11 (1973).
22. 58 Wis. 2d 514, 206 N.W.2d 613 (1973).
23. 57 Wis. 2d 218, 222, 203 N.W.2d 719 (1973).
24. Terry v. Ohio, *supra* n. 19, State v. Chambers, 55 Wis. 2d 289, 198 N.W.2d 377 (1972).
25. 407 U.S. 143 (1972).
26. *See supra* n.24.

the pockets and empty the contents.[27] The apparent incongruity in the court's application of the "stop and frisk" rule as between *Waite* and *Beaty* raises question as to what the court considers a reasonable search.

In the *Williamson* case the defendant was convicted of carrying a concealed weapon based on evidence obtained in a stop and frisk type search. The police officer observed the defendant acting suspiciously. After stopping the defendant, the officer proceeded to question the defendant while the defendant was in an automobile. When the defendant was unable to produce a driver's license or other identification, the officer requested that the defendant step out of the car. After the defednant egressed, the officer patted the defendant down and felt hard objects in the pants of the defendant. The defendant was asked to remove the objects and the defendant produced six .38-caliber catridges. The supreme court held this limited search was legal based on the premise that under the circumstances the stopping was reasonable and the "very limited frisking or pat-down" was allowable so that the officer could continue his investigation without fear of violence.[28] A further search of the automobile, also held reasonable and legal, produced a loaded .38-caliber revolver.

The circumstances in the *Beaty* and *Williamson* cases, which gave rise to the original police conduct, seemed to have been far more suspicious than the circumstance in the *Waite* case. Notwithstanding that fact, the court still held the *Waite* search reasonable without the pat down. Generally, however, the court does follow the trend established by previous cases[29] that a stop and frisk search will be upheld if there is: 1) suspicious conduct by the defendant, 2) reasonable stopping to question, 3) reasonable fear for personal safety by the police, or 4) a pat down or knowledge by the police that the defendant is armed. However, the *Waite* case is outside this trend and therefore raised questions as to the court's application of the "stop and frisk" rationale.

III. CRIMINAL PLEAS

A. Guilty Pleas

Pleading guilty to a criminal charge is, of course, a serious

27. 57 Wis. 2d 531, 539, 205 N.W.2d 11 (1973).

28. 58 Wis. 2d 514, 519, 206 N.W.2d 613 (1973).

29. Terry v. Ohio, *supra* n. 19; Adams v. Williams, *supra* n. 25, State v. Chambers, *supra* n. 24.

matter since a person doing so relinquishes constitutionally guaranteed rights. In an effort to assure that a guilty plea is properly taken, the United States Supreme Court has imposed certain requirements: 1) It must be made voluntarily and knowingly representing an intelligent choice among alternative courses of action open to the defendant;[30] and 2) it must be voluntary and noncoerced to withstand an attack as rewarding denial of due process.[31] The Wisconsin Supreme Court, in *Ernst v. State*,[32] held that these requirements for accepting a guilty plea are applicable to the states. The Wisconsin Legislature had codified similar requirements.[33]

In the case of *State v. Chabonian*[34] the court considered the issue of whether a guilty plea was "voluntarily and knowledgeably" made when the defendant was represented by counsel. The defendant in the case moved for post conviction relief pursuant to Wisconsin Statutes Section 974.06 alleging that there was an arguable defense to the crime charged and therefore the guilty plea should not have been accepted. The trial court denied the motion, and the supreme court affirmed.

The Wisconsin Supreme Court relied on the fact that the defendant was represented by counsel at the arraignment and therefore there was a presumption that the plea had been knowledgeably and voluntarily made. This presumption was recognized in *State v. Strickland*,[35] a case decided before the United States Supreme Court had formulated its present requirements in *Boykin v. Alabama*,[36] and was applied to defendants convicted before *Boykin*. The onus of overcoming this presumption was on the defendant. However, in applying this presumption to the defendant in *Chabonian*, the supreme court also relied on a post-*Boykin* case, *North Carolina v. Alford*,[37] in which the defendant was also repre-

30. North Carolina v. Alford, 400 U.S. 25 (1970).
31. Boykin v. Alabama, 395 U.S. 238 (1969).
32. 43 Wis. 2d 661, 170 N.W.2d 713 (1969).
33. WIS. STATS. §971.08(1):

Before the court accepts a plea of guilty or no contest, it shall:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted; and

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

34. 55 Wis. 2d 723, 201 N.W.2d 25 (1972).
35. 27 Wis. 2d 623, 135 N.W.2d 295 (1965).
36. 395 U.S. 238 (1969).
37. *See supra* n. 30.

sented by counsel. In both the *Alford* and *Chabonian* cases there was also a strong factual basis of guilt. It might be inferred from the *Chabonian* holding that when there is a factual basis of guilt; adequate representation by counsel; and a minimal inquiry by the court of the defendant's knowledge of the charge, the requirement of *Boykin* and Wisconsin Statutes Section 971.08(1) will have been met.

B. Plea Bargaining

A procedure that is frequently associated with guilty pleas is that of "plea bargaining." The effects of a plea bargain can occur at several stages in the criminal justice system. For a promise to plead guilty, the district attorney may decline to charge other possible crimes; may dismiss or reduce charges; or in return for the promise, may recommend a lenient sentence.[38] The United States Supreme Court has recognized the constitutional validity of such plea bargaining.[39]

An important aspect of plea bargaining was considered by the supreme court in *State ex rel. White v. Gray*[40] and *Wilson v. State.*[41] In these cases the court considered the making of a record of the substance of the bargain.

In *White*, the defendant, after pleading guilty, was convicted of burglary and sentenced to a state prison. The defendant, in his post-conviction proceedings, alleged that his guilty plea was not voluntary and that he would be allowed to withdraw his plea. The defendant entered a guilty plea and charges against his brother were subsequently dropped.

The matter of making a record of the bargain reached has been recommended in a number of previous Wisconsin cases[42] and is in fact required in two other jurisdictions.[43] The Wisconsin court gave two reasons why a record should be made: 1) ". . . to protect the defendant in the event the prosecutor reneges from his part of the bargain" and 2) ". . . to protect the state against later false

38. *See* BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 110 (1971).

39. Brady v. United States, 397 U.S. 472 (1970).

40. 57 Wis. 2d 17, 203 N.W.2d 638 (1972).

41. 57 Wis. 2d 508, 204 N.W.2d 508 (1973).

42. State v. Harrell, 40 Wis. 2d 187, 161 N.W.2d 223 (1968); State v. Wolfe, 46 Wis. 2d 478, 175 N.W.2d 216 (1970); Austin v. State, 49 Wis. 2d 727, 183 N.W.2d 56 (1971).

43. People v. West, 91 Cal. Rptr. 385, 477 P.2d 409 (1970); Commonwealth v. Alvarado, 442 Pa. 2d 516, 276 A.2d 526 (1971).

claims of unkept bargains. . ."[44] In *White* the court continued its insistence that a record of a plea bargain be made and remanded the case to the trial court for a fact finding hearing concerning the plea bargain because of the incomplete record.

It should be noted that in the *White* case the court also considered a matter of first impression in this jurisdiction, namely, what effect a special concession to another person had on the plea bargaining with the defendant. However, the court did not answer this question because of the incomplete record, but did conclude that

> . . . the voluntariness of a plea bargain which contemplates special concessions to another . . . especially a sibling or a loved one . . . bears particular scrutiny by a trial or reviewing court conscious of the psychological pressures upon an accused such a situation creates.[45]

The *Wilson* case was similar to the *White* case in that the defendant, after pleading guilty, was found guilty of the charge of burglary. It was not until after the defendant's probation was revoked that he attempted to withdraw his guilty plea on grounds that his plea was not voluntary. In *Wilson* the court continued its trend of requiring that a record be made of the plea bargain and approved its holding on that aspect in the *White* case.

When considering the voluntariness of the guilty plea, the court noted that the defendant was represented by counsel and made several references to the conduct of the defense counsel on behalf of the defendant during the proceedings. The court held that the plea was voluntarily given and that there was no "manifest necessity" to withdraw the guilty plea. It is submitted that when considering whether or not the guilty plea was voluntary, the court indulged in the presumption explained above in the *Chabonian* discussion. The court stated in the course of its opinion:

> Cases involving a plea bargain where the defendant is represented by counsel stand on a somewhat different basis than those where the defendant pleads guilty without an agreement or waives counsel and pleads guilty.[46]

Therefore, it seems that the court is following a trend, started with *Strickland*, towards being more lenient with the trial court in taking a guilty plea when the defendant is represented by counsel, than

44. 47 Wis. 2d at 24.
45. 57 Wis. 2d at 29.
46. 57 Wis. 2d at 511.

when he is not.

Plea bargaining has a necessary function in the criminal justice system in that it terminates many criminal prosecutions with a guilty plea. This helps the courts to process more cases, which in turn tends to lessen the large backlog of cases experienced today. This function is becoming more important every day and an expansion of the scope of plea bargaining, but maintaining the rights of the defendant, does not seem unrealistic. The inclusion of a judge in the bargaining process, in an appropriate case, also does not seem improper. Such action would eliminate an extra step in the system and would benefit both the state and the defendant in that the matter could be disposed of immediately rather than proceeding to the court and informing the judge of what had transpired at the bargaining session.

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DOMESTIC RELATIONS

The most significant case of the Term in the area of domestic relations considered the termination of parental rights of a natural father to his illegitimate child, *State ex rel. Lewis v. Lutheran Social Services*.[1] In that case Jerry D. Rothstein sought to gain custody of a child born out of wedlock. Rothstein swore he was the natural father of the child, and had made his desire to take custody of the child known to the mother prior to the child's birth. However, the mother kept the birth and whereabouts of the child secret, until after her parental rights had been terminated at a hearing of the LaCrosse County Court. The child had subsequently been placed in a prospective adoptive home.

Because Rothstein had been given no notice of this hearing to terminate parental rights, he sought to vacate the county court order and petitioned that court for a hearing concerning his right to care, custody and control of the child. The county court denied his petition, and Rothstein appealed to the Wisconsin Supreme Court for a writ of habeas corpus to determine his rights to legal custody of the child.

In an earlier case,[2] the court had determined that Rothstein, as

1. 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

2. State ex rel. Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970).